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GOVERNMENT ACCOUNTABILITY OFFICE

4 CFR Part 21

Government Accountability Office, Administrative Practice and Procedure, Bid Protest Regulations, Government Contracts

AGENCY: Government Accountability Office.

ACTION: Final rule.

SUMMARY: This document amends the Government Accountability Office's (GAO) Bid Protest Regulations, promulgated in accordance with the Competition in Contracting Act of 1984 (CICA), to implement the requirements in sec. 1501 of the Consolidated Appropriations Act for Fiscal Year 2014, which was enacted on January 14, 2014. These amendments implement the legislation's direction to establish and operate an electronic filing and document dissemination system for the filing of bid protests with GAO. The amendments also include administrative changes to reflect current practice, to streamline the bid protest process, and to make clerical corrections.

DATES: This rule is effective: May 1, 2018.

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SUPPLEMENTARY INFORMATION:

Background

On April 16, 2016, GAO published a proposed rule (81 FR 22197) to amend its Bid Protest Regulations. The supplementary information included with the proposed rule explained that the proposed revisions to GAO's Bid Protest Regulations were promulgated in accordance with CICA, as the result of a statutory requirement imposed by the Consolidated Appropriations Act for 2014, Pub. L. 113-76, 128 Stat. 5 (Jan. 14, 2014). Section 1501 of this act directs GAO to establish and operate an electronic filing and document dissemination system, "under which, in accordance with procedures prescribed by the Comptroller General—(A) a person filing a protest under this subchapter may file the protest through electronic means; and (B) all documents and information required with respect to the protest may be disseminated and made available to the parties to the protest through electronic means." Pub. L. 113-76, div. I, title I, sec. 1501, 128 Stat. 5, 433-34 (Jan. 17, 2014). The proposed rule advised that GAO was developing the system, which is called the Electronic Protest Docketing System (EPDS). As of the effective date of this final rule, EPDS will be the sole means for filing a bid protest at GAO (with the exception of protests containing classified information) and will enable parties to a bid protest and GAO to file and receive documents. Additional guidance for the use of EPDS is provided by GAO in the EPDS Instructions, which are available at <https://epds.gao.gov/login>.

In addition to directing GAO to establish and operate an electronic filing and document dissemination system, sec. 1501 of the Consolidated Appropriations Act for 2014 authorizes GAO to "require each person who files a protest under this subchapter to pay a fee to support the establishment and

operation of the electronic system under this subsection.” Pub. L. 113-76, div. I, title I, sec. 1501, 128 Stat. 5, 434 (Jan. 17, 2014). The proposed rule advised that GAO will require persons filing a protest to pay a fee to file a protest through EPDS, and that GAO anticipates that the fee will be \$350. Additional guidance regarding procedures for payment of the fee is available in the EPDS Instructions.

Finally, the proposed rule addressed other administrative changes to reflect current practice and to streamline the bid protest process.

Summary of comments

GAO received a total of 34 timely comments by the closing date of May 16, 2016. GAO received 6 comments from federal agencies; 11 comments from businesses (including 2 comments from the same business on different dates), all of which were identified as small businesses; 2 comments from professional associations; 3 comments from law firms and consulting firms; and 12 comments from individuals or anonymous commentators. In adopting this final rule, GAO has carefully considered all comments received.

Electronic Protest Docketing System (EPDS)

Request for more details

Seven commentators requested additional information as to how EPDS will function. For example, the commentators asked for information concerning how the implementation of EPDS will occur, how to pay the fee, how documents will be uploaded and distributed through EPDS, how agencies will be notified by GAO of the filing of a protest, and the security provisions for EPDS.

GAO response: The purpose of the proposed revisions to our regulations is to implement sec. 1501 of the Consolidated Appropriations Act for Fiscal Year 2014 and to make certain administrative changes to reflect current practice and to streamline the bid protest process. GAO has issued guidance regarding EPDS, including the transition to EPDS, at <https://epds.gao.gov/login>. Additional information regarding the procedures for using EPDS is available in the EPDS Instructions.

Classified documents

GAO proposed to revise redesignated paragraph (g) of 4 CFR 21.1 to clarify how a document is “filed” under GAO’s Bid Protest Regulations by specifying that EPDS will be the sole method for filing a document with GAO for a bid protest—with the exception of protests containing classified material, as explained in a sentence added to the revised paragraph (h) of 4 CFR 21.1. The revisions throughout this final rule reflect that all filings are presumed to be made through EPDS (with the exception of protests containing classified material), which will enable the parties and GAO to file and receive documents.

Two commentators suggested that the proposed rule at paragraph (h) of 4 CFR 21.1, which states that classified documents “may not” be filed through EPDS, should be revised to use more expressly prohibitive language.

GAO response: GAO agrees with the suggestion and will revise our regulations to state that documents with classified material “shall not” be filed through EPDS.

One commentator requested that GAO clarify that the prohibition on filing documents containing “classified” material does not refer to proprietary or source-selection sensitive information.

GAO response: GAO does not believe that the rule requires clarification, but affirms here that the term “classified” refers to information deemed classified by a United States government agency for national security reasons, and not to information that is proprietary or source-selection sensitive.

One commentator requested that we revise the rules to provide for alternative filing procedures for documents that contain classified material.

GAO response: As discussed above, the EPDS Instructions provide guidance regarding the use of EPDS. Consistent with current practice, the EPDS Instructions direct parties to contact GAO for guidance in filing documents that contain classified material.

Exclusive use of EPDS

One commentator opposed the proposed rule in redesignated paragraph (g) of 4 CFR 21.1 that EPDS will be the sole means for filing documents in a bid protest. The commentator expressed concern that some documents may be unsuitable due to size or other formatting issues for electronic submission.

GAO response: GAO confirms that EPDS will be the sole means for filing documents in connection with a protest, with two exceptions: (1) documents containing classified material, and (2) documents that, for reasons of size or format, are not suitable for filing through EPDS. The EPDS Instructions address the process for filing these two categories of documents.

Additional corrections

The final rule makes additional minor corrections to paragraphs (c), (f), and (h) of 4 CFR 21.3 to reflect that documents must be filed through EPDS.

Filing fee for bid protests

The proposed rule advised that GAO anticipates requiring persons filing a protest to pay a fee to file a protest through EPDS, which, as discussed above, will be the sole means for filing a bid protest at GAO. GAO advised that the anticipated fee will be \$350. The EPDS Instructions address how persons filing a protest must pay the fee, and the circumstances under which the fee will apply. A fee will be required for filing a protest. At this time, additional fees will not be required for supplemental protests, requests for reconsideration, requests for recommendation for reimbursement of costs, or requests for recommendation on the amount of costs.

Support and opposition to the fee

GAO received six comments in favor of the proposed fee.

Five commentators advocated for a higher fee. One commentator proposed requiring an additional, potentially higher fee for each supplemental protest, because, in the commentator's view, protesters routinely supplement their protests with more arguments in an attempt to circumvent timeliness or engage in "gamesmanship." One commentator proposed requiring protesters to file fees based on a graduated scale to discourage what the commentator viewed as "serial" or frequent protesters. Under the proposed graduated scale, a protester would be required to file higher fees if it files multiple protests during the

course of a year, e.g., a base fee for the first five protests, twice the base fee for more than five but less than eight protests, and four times the base fee for more than eight protests.

One commentator suggested that a fee of up to \$1,000 would be appropriate, and that the overall goal of the fee should be the reduction of GAO's caseload, which would in turn permit GAO to issue decisions in fewer days. The same commentator suggested that a fee that was based on a percentage of the value of the procurement could be appropriate.

One commentator supported the fee and expressed the view that a fee could discourage "frivolous" protests.

Fifteen commentators opposed the proposed fee. All of the commentators opposed to the fee recommended that GAO either establish a lower fee for small businesses or waive the fee for small businesses.

Fourteen commentators opposed the fee on the basis that the fee creates a barrier to filing protests for small businesses, some of which stated that they lack the resources to pay the fee. In particular, one commentator argued that a \$350 fee would make a protest economically infeasible for small businesses seeking the award of very small contracts.

Two commentators argued that because GAO is funded through appropriated funds a separate fee for bid protests is not warranted.

One commentator argued that a fee is not justified because GAO's bid protest forum is not staffed by judges, and that a fee should not be imposed in a manner similar to that imposed by a court. Another commentator argued that a

fee is not justified because GAO does not have the same authority to enforce its decisions as a court.

One commentator argued that the fee is an attempt by GAO to discourage bid protests and thereby limit oversight over improper contracting actions by agencies. The commentator opposed the fee based on what the commentator views as GAO's failure to be an effective forum for the resolution of protests concerning small businesses, veteran-owned small businesses, and service-disabled veteran-owned small businesses. The commentator also opposed the fee on the basis that GAO failed to conduct adequate outreach to service-disabled veteran-owned small businesses—in particular, the commentator.

One commentator, while not expressly opposed to the fee, proposed a periodic reassessment of the fee to consider its impact on small business.

GAO response: GAO has considered all of the comments submitted regarding the proposed fee for filing a protest through EPDS. Additionally, GAO solicited views concerning the proposed fee from a number of business groups and associations that represent small businesses, including veteran-owned businesses, women-owned businesses, and minority-owned businesses. Further, although GAO is not subject to the Administrative Procedures Act, GAO voluntarily issued the proposed rule (81 FR 22197, Apr. 16, 2016) and invited comments.

As discussed in the proposed rule, sec. 1501 of the Consolidated Appropriations Act for 2014 directs GAO to establish and operate an electronic filing and document dissemination system, and authorizes GAO to “require each

person who files a protest under this subchapter to pay a fee to support the establishment and operation of the electronic system under this subsection.”

Pub. L. 113-76, div. I, title I, sec. 1501, 128 Stat. 5, 434 (Jan. 17, 2014). GAO derived the \$350 fee using a methodology that took into account development costs for EPDS, estimates of hosting and maintenance costs, estimates of future bid protest filings, and a recovery period for development costs of approximately seven years.

GAO does not intend for the fee to discourage or reduce the number of protests. Rather, the proposed fee will cover the costs of establishing and operating EPDS. GAO does not agree with the proposals to charge a fee that is higher than necessary to address the costs of EPDS or for the purpose of discouraging protests. With regard to a lower fee or fee waiver for small businesses, GAO has concluded that the anticipated fee of \$350 is appropriate given the costs of the system. Additionally, GAO has concluded that the interest of administrative efficiency supports imposition of a uniform fee for all protests.

GAO will monitor the fee to ensure that it is properly calibrated to recover the costs of establishing and maintaining the system. Any adjustment to the fee based on the review will reflect changes in the costs of EPDS, as is consistent with the statutory direction.

Other comments on the fee

In addition to the comments regarding the requirement for a fee and the amount of the fee, GAO received six additional comments.

One commentator proposed that the requirement to pay a fee be expressly incorporated into 4 CFR 21.1, and that the regulation specify that failure to pay the fee will result in dismissal of a protest.

GAO response: GAO believes that the proposed rule makes clear that filing protests through EPDS is mandatory, other than classified protests, and GAO has advised that filing a protest through EPDS will require a fee. The EPDS Instructions provide additional guidance for the use of EPDS. GAO confirms that EPDS will not permit the filing of a protest without confirmation of payment. GAO also confirms that the filing of classified protests will also require payment of a fee.

Three commentators recommended that protesters be automatically refunded or reimbursed the fee if GAO sustains a protest.

GAO response: GAO does not agree that the fee should be automatically reimbursed by GAO if a protest is sustained. Instead, paragraph (d) of 4 CFR 21.8 provides that, if GAO sustains a protest, GAO may recommend that the agency reimburse the protester's costs of pursuing its protest. Additionally, paragraph (e) of 4 CFR 21.8 provides that, where an agency takes corrective action in response to a protest, the protester may request that GAO recommend that the agency reimburse the protester's costs of pursuing its protest. Fees will be reimbursable costs of pursuing a protest in the event GAO recommends that the agency reimburse protest costs.

Two commentators proposed that protesters be automatically refunded or reimbursed the fee if an agency takes corrective action in response to a protest.

GAO response: GAO does not agree that the fee should be automatically reimbursed by GAO if an agency takes corrective action in response to a protest. Instead, paragraph (e) of 4 CFR 21.8 provides that, if an agency decides to take corrective action in response to a protest, the protester may request that GAO recommend that the agency reimburse the protester's costs of pursuing the protest. Fees will be reimbursable costs of pursuing a protest in the event GAO recommends that the agency reimburse protest costs.

Filing a protest

One commentator asked whether, in light of the requirement to file all documents with GAO through EPDS, protesters will continue to be required to provide a copy of the protest to the contracting officer, as required by paragraph (e) of 4 CFR 21.1.

GAO response: GAO did not revise the requirement to provide a copy of the protest to the contracting officer, as required by paragraph (e) of 4 CFR 21.1. GAO believes that this requirement, which is separate from the requirement to file documents with GAO through EPDS, remains an important requirement so that contracting officers are provided prompt notice of protests, which enables them to meet their obligations to notify interested parties, as required by Federal Acquisition Regulation section 33.104(a)(2) and paragraph (a) of 4 CFR 21.3.

One commentator requested that redacted versions of protests should be posted in EPDS in a manner that is available to the public.

GAO response: EPDS does not allow access to documents, redacted or otherwise, to non-parties.

Time for filing

GAO proposed to revise paragraph (a) of 4 CFR 21.2 to clarify that where a basis for challenging a solicitation becomes known after the solicitation's closing date, but the solicitation does not establish a new closing date, the protest must be filed within 10 days of when the protester knew or should have known of that basis—regardless of whether the time period for filing other protest claims was “tolled” because a required debriefing had been requested. The revision was proposed to address a conflict as to which of our timeliness rules—21.2(a)(1) or 21.2(a)(2)—takes precedence where a solicitation impropriety becomes apparent after proposals have been submitted, but there is no opportunity to submit revised proposals. Our Office addressed this issue in two decisions: *Protect the Force, Inc.—Reconsideration*, B–411897.3, Sept. 30, 2015, 2015 CPD ¶ 306, and *Armorworks Enterprises, LLC*, B–400394, B–400394.2, Sept. 23, 2008, 2008 CPD ¶ 176. The revision as proposed makes 4 CFR 21.2(a)(2) consistent with the policy outlined in those decisions.

One commentator opposed the proposed revision to paragraph (a)(2) of 4 CFR 21.2 and argued that the policy established in the two decisions should be reversed. The commentator argued that allowing protests concerning this type of solicitation impropriety to be “tolled” until after a required and requested debriefing has been provided would avoid the possibility of a protester with “mixed” protest claims (i.e., claims of an alleged solicitation impropriety as well as claims concerning the source selection) from being required to file two separate protests.

GAO response: GAO believes the revision is necessary to reflect our decisions and to avoid the conflict in the current rules. As an initial matter, the circumstance described by the commentator arises in exceedingly few protests. In any event, and as discussed in the two decisions that address this issue, there is sound policy underlying the proposed revision. Namely, the revision advances the principle that allegations of solicitation improprieties should be resolved as early as possible in the procurement process in order to promote fairness and efficiency. Further, adopting the policy advocated by the commentator could result in protesters and agencies unnecessarily expending time and resources on actions—such as preparing a protest concerning a source selection decision, in the protester’s case, and preparing and providing debriefings, in the agency’s case—in instances where there is merit in the allegation regarding the solicitation impropriety. For these reasons, we decline to eliminate the revision as requested by the commentator.

Communication among parties

GAO proposed to revise paragraph (a) of 4 CFR 21.3 to require that parties to a protest provide copies of all protest communications “to the agency and to other participating parties” either through EPDS or email.

Three commentators expressed concern that the proposed revision would require parties to copy all other parties on all exchanges concerning the protest, including strategy or settlement communications.

GAO response: The proposed revision to paragraph (a) of 4 CFR 21.3 was not intended to prohibit the parties from engaging in communications that do

not involve GAO, or communications between some, but not all parties. Rather, the rule was intended to update the current rule to include EPDS. The current rule requires all parties to be copied on all protest communications, which, in practice, means that when a party communicates with GAO, it must copy the other parties. To avoid confusion, GAO will revise the final rule to provide that parties must copy all other parties on communications with GAO.

Two commentators requested clarification as to how GAO will communicate with parties after the implementation of EPDS.

GAO response: As discussed above, the EPDS Instructions provide guidance regarding the use of EPDS. EPDS will provide email notification to parties of communications by GAO to the parties transmitted through EPDS. GAO also anticipates that some communications to the parties will continue to be made through email and telephone, as appropriate.

Additional documents

GAO proposed to revise paragraph (c) of 4 CFR 21.3 to clarify that if the fifth day for filing the agency's required response to a protester's request for documents falls on a weekend or federal holiday, the response shall be filed on the last business day that precedes the weekend or federal holiday.

Calculating the due date

One commentator expressed support for the revision to paragraph (c) because it avoids a potential ambiguity as to the due date for the agency's response.

One commentator objected to the revision to paragraph (c) because it results in less time for agencies to prepare their responses to document requests and allows protesters more time to object to an agency's list of documents to be filed.

GAO response: GAO believes that a revision to the date for the agency's response is required due to a potential ambiguity when the due date falls on a weekend or federal holiday. The resolution of the ambiguity necessarily results in either a longer or shorter time for agencies to respond. GAO concludes that a potentially shorter time for the agency's response, and potentially longer time for the protester to identify concerns or objections regarding the agency's response, is consistent with our statutory obligation to resolve protests within 100 days.

Filing before the due date

One commentator suggested that the requirement to file an agency's response "on the last business day . . .", should be revised to require filing "by the last business day . . .", to reflect an agency may file its response earlier.

GAO response: GAO agrees that the use of the term "by," rather than "on" is appropriate and will revise paragraph (c) of 4 CFR 21.3 in the final rule to reflect this change.

Submission of the agency report

One commentator expressed the view that paragraph (d) of 4 CFR 21.3, which requires the agency report to "include" a contracting officer's statement, inadvertently suggests that the memorandum of law is part of the contracting officer's statement.

GAO response: Although this language was not proposed for revision, and does not appear to have caused confusion for agencies in the preparation of their agency reports, GAO agrees that placing the phrase “including a best estimate of the contract value” in parentheses avoids any implication that the contracting officer is responsible for preparing a memorandum of law. This revision is reflected in the final rule.

One commentator objected to the revision to paragraph (d) of 4 CFR 21.3, which currently requires the agency report to include a copy of the protest. The commentator argued that the protest is a relevant document that should be included in the report.

GAO response: We believe that inclusion of a copy of the protest is no longer required because this document will already have been filed through EPDS. This revision is reflected in the final rule.

Protective orders

Filing redactions

GAO proposed to redesignate paragraph (b) of 4 CFR 21.4 as paragraph (c), redesignate paragraph (c) as paragraph (d), redesignate paragraph (d) as paragraph (e), and add a new paragraph (b). New paragraph (b) provides that when parties file documents that are covered by a protective order, the parties must provide copies of proposed redacted versions of the document to the other parties within 1 day after the protected version is filed. Proposed redacted versions of documents should not be filed through EPDS; rather, the party responsible for preparing the proposed redacted version of the document should

provide the document to the other parties by email or facsimile. New paragraph (b) provides that, where appropriate, the exhibits to the agency report or other documents may be proposed for redaction in their entirety. Additionally, new paragraph (b) provides that the party that files the protected document must file through EPDS within 5 days a final, agreed-to redacted version of the document. New paragraph (b) also directs the parties to seek GAO's resolution of any disputes concerning redacted documents.

Five commentators expressed concern that requirements to prepare and review proposed and final redacted versions of documents will place a burden on parties because of the resources required to prepare and approve the redactions. One commentator argued that a requirement to prepare redacted versions of all documents filed under a protective order would be inconsistent with GAO's statutory mandate under CICA to provide for the inexpensive resolution of bid protests.

Two commentators expressed the view that the "current practice" for parties filing protected documents is for the parties to negotiate among themselves as to which documents should remain under the protective order in their entirety and which documents should be redacted for release outside the protective order. These commentators suggested that the proposed rule in new paragraph (b) be revised to allow the parties "flexibility" in deciding which documents to redact. One commentator expressed concern that the requirement that the agency prepare redacted versions that inform pro se parties will be burdensome. Another commentator expressed specific concern with regard to

pro se intervenors where there is a protester represented by counsel admitted to a protective order.

GAO response: Paragraph 2 of GAO's standard protective order requires parties to file proposed redacted versions of every document marked protected. GAO recognizes, however, that the practice among parties in many protests is to agree not to prepare redacted versions of all documents. GAO also recognizes that preparation of redacted versions of documents requires resources on the part of the parties that prepare them and on the part of the other parties who must review them. GAO will revise new paragraph (b) of 4 CFR 21.4 to provide that when a party files a document in EPDS that is marked protected, that party must, at the request of another party, provide a proposed redacted version of the document to the requesting party within 2 days. This revision is intended to balance the legitimate interest in providing public versions of documents against the parties' costs of preparing and reviewing such documents.

One commentator requested that new paragraph (b) of 4 CFR 21.4 expressly permit party-specific redactions, for example, redactions that may be released only to either the protester or intervenor.

GAO response: GAO has not opposed the preparation and approval of party-specific redactions. Neither 4 CFR 21.4 nor the protective order prohibit this practice, and GAO does not see a need to address this matter in the rule.

One commentator noted that the proposed rule stated that "Proposed redacted versions of documents should not be filed through EPDS; rather, the party responsible for preparing the proposed redacted version of the document

should provide the document to the other parties by e-mail or facsimile.” The commentator suggested that there is no reason to limit the non-EPDS exchanges between the parties to email or facsimile.

GAO response: Although this instruction was not included in the text of the revised regulation, GAO agrees with the commentator that there is no reason to limit the non-EPDS exchanges between the parties to email or facsimile.

Issues not for consideration

Protests of orders issued under task or delivery order contracts

GAO proposed to add paragraph (l) of 4 CFR 21.5 to reference the provisions of 10 U.S.C. 2304c(e)(1) and 41 U.S.C. 4106(f)(1), which limit GAO’s jurisdiction to hear protests in connection with the issuance or proposed issuance of a task or delivery order issued under indefinite-delivery, indefinite-quantity contracts where the order is valued at dollar thresholds established by the statutory provisions, unless it is alleged that the order increases the scope, period, or maximum value of the contract under which the order was issued.

One commentator proposed that paragraph (l) of 4 CFR 21.5 be revised to clarify that GAO has jurisdiction to hear protests concerning orders issued under the Federal Supply Schedule (FSS).

GAO response: The proposed rule states that GAO’s jurisdiction to review protests of orders issued under task or delivery order contracts is limited by the provisions of 10 U.S.C. 2304c(e)(1) and 41 U.S.C. 4106(f)(1), which were enacted as part of the Federal Acquisition Streamlining Act of 1994 (FASA), as amended. As GAO has explained in numerous bid protest decisions, the

statutory authority under FASA for agencies to award multiple-award task and delivery order contracts and issue orders under those contracts is separate from the statutory authority to award multiple-award FSS contracts and for agencies to issue orders under those contracts. E.g., *Severn Cos., Inc.*, B–275717.2, Apr. 28, 1997, 97-1 CPD ¶ 181. For this reason, we have concluded that the jurisdictional limitations on GAO’s review of orders issued under task or delivery order contracts pursuant to FASA does not affect our Office’s jurisdiction to hear protests concerning orders issued under the FSS. Because the proposed revision addresses only the jurisdictional limits under FASA, we see no reason to add additional provisions addressing the FSS.

Protests of awards, or solicitations for awards, of agreements other than procurement contracts

GAO proposed to add paragraph (m) to 4 CFR 21.5 to clarify that GAO has the authority to review protests that an agency is improperly using a non-procurement instrument.

One commentator proposed that we clarify that our review of protests alleging that an agency is improperly using a non-procurement instrument is limited to whether an agency is improperly using the non-procurement instrument to procure goods or services.

GAO response: We agree that the proposed clarification reflects the longstanding practice by our Office to review such protests and will revise paragraph (m) of 4 CFR 21.5 in the final rule to reflect that GAO will review

protests that an agency is improperly using a non-procurement instrument to procure goods or services.

Withholding of award and suspension of contract performance

GAO proposed to revise 4 CFR 21.6 to require agencies to file a notification in instances where it overrides a requirement to withhold award or suspend contract performance, and to file a copy of any issued determination and finding.

One commentator questioned why GAO proposed to require this information, in light of the statement in the same paragraph that “GAO does not administer the requirements to stay award or suspend contract performance under CICA at 31 U.S.C. 3553(c) and (d).”

GAO response: GAO’s proposed rule noted that 31 U.S.C. 3554(b)(2) requires our Office to consider the basis for an agency’s override in determining the remedy to recommend in the event we sustain a protest. To further clarify, 31 U.S.C. 3554(b)(2) states that if an agency issues an override based on the “best interests of the United States,” then GAO shall make a recommendation upon sustaining a protest “without regard to any cost or disruption from terminating, recompeting, or reawarding the contract.” Since this statutory provision requires GAO to consider the basis for any agency’s override decision, GAO proposed to revise 4 CFR 21.6.

One commentator objected to the requirement to file the override decision, and proposed that agencies be required to advise GAO whether an override

decision was based on the “best interests of the United States,” or “urgent and compelling circumstances.”

GAO response: GAO agrees that the statutory requirement for our Office to issue recommendations that take into consideration the basis for an override can also be met if the agency advises GAO of that basis, without providing the decision itself. GAO is therefore issuing this final rule to state that, when an agency issues a determination and finding to override a requirement to withhold award or suspend contract performance, the agency must file either the determination and finding itself or a statement by the official who approved the determination and finding that specifies the statutory basis for the override.

One commentator proposed revising the proposed rule to state that the decision must be filed “unless classified.”

GAO response: GAO does not believe that a revision is required here, as the proposed revision to paragraph (h) of 4 CFR 21.1 states that documents containing classified material cannot be filed through EPDS. As explained above, this proposed revision is further revised in the final rule to make clear that documents containing classified material “shall not” be filed through EPDS.

Remedies

Recommendation for reimbursement of costs

GAO proposed revising paragraph (e) of 4 CFR 21.8 to provide that a protester must file comments on an agency’s response to a request for a recommendation for reimbursement of costs within 10 days and to further provide

that GAO will dismiss the request if the protester fails to file comments within 10 days.

One commentator opposed this proposed revision, arguing that GAO should consider requests even where the protester does not file comments on the agency's response. The commentator suggested that the agency's response to the request should be sufficient for GAO to rule on the request.

GAO response: A protester's comments on an agency's response to a request for a recommendation for reimbursement of protest costs are necessary to provide an adequate record for GAO to review in issuing its decision. GAO believes that where a protester fails to respond within 10 days—the same period of time permitted for filing comments on an agency report—it is appropriate to deem the protester as having abandoned its request. GAO does not believe that resolution of an abandoned request is an appropriate use of our Office's resources.

One commentator expressed concern that the requirement in paragraph (e) of 4 CFR 21.8 that agencies respond to a request for a recommendation for reimbursement of costs within 15 days will require agencies to address requests for costs that are contained in the initial protest—thus requiring the agency to address requests for costs within 15 days of a protest's initial filing, that is, before the due date for filing the agency report as required by paragraph (c) of 4 CFR 21.3.

GAO response: We do not agree with the commentator's interpretation of the requirements of paragraph (e) of 4 CFR 21.8. The plain language of

paragraph (e) refers to requests filed by protesters for recommendation of reimbursement of costs after GAO dismisses a protest based on an agency's decision to take corrective action. For this reason, we see no basis to conclude that paragraph (e) requires an agency to file a response to a request that is made outside the procedures set forth in that paragraph.

One commentator proposed that we revise paragraph (e) to state that GAO will not recommend reimbursement of costs where an agency takes corrective action in response to a protest prior to providing the agency report. Another commentator proposed that we revise paragraph (e) to state that GAO will not recommend reimbursement of costs unless the agency has unreasonably delayed taking corrective action.

GAO response: Paragraph (e) of 4 CFR 21.8 provides that GAO "may recommend" reimbursement of protest costs where an agency has taken corrective action in response to a protest. The two commentators' suggestions relate to the legal standard applied by our Office in determining when a recommendation for reimbursement is appropriate. The proposed rule is meant to establish the procedure for filing requests for recommendation of reimbursement of costs and does not attempt to set forth the full legal standard that has been applied by our Office. Because it would be impractical to incorporate all circumstances encompassed within our decisions in this rule, we conclude that a revision is not necessary.

Recommendation on the amount of costs

One commentator requested that we incorporate a reference to the legislative history concerning the statutory provision at 31 U.S.C. 3554(c), which provides that although reimbursement for a protester's legal fees shall be capped at \$150 per hour, small businesses are not subject to this limitation. The commentator noted that the conference committee's report on FASA, which imposed the \$150 per hour cap, stated as follows: "The conferees expect the Comptroller General to be vigilant in reviewing attorneys' fees to ensure that they are reasonable. The cap placed on attorneys' fees for businesses other than small business constitutes a benchmark as to what constitutes a 'reasonable' level for attorneys' fees for small businesses." H. Rept. 103-712, section 1403 (Aug. 21, 1994), as reprinted in 1994 U.S.C.C.A.N. 2607, 2621-22.

GAO response: Our Office previously addressed this provision in a decision recommending the amount of attorneys' fees to be reimbursed for a small business whose protest had been sustained. See *Public Communications Services, Inc.—Costs*, B-400058.4, June 25, 2009, 2009 CPD ¶ 131. In that decision, GAO stated that "we recognize that the FASA conference committee reiterated our Office's responsibility, imposed in 1984 by CICA, to ensure that attorneys' fees sought for reimbursement are reasonable." *Id.* at 8. Nonetheless, we concluded "we do not view the benchmark language as imposing an additional limitation (i.e., a cap) on attorneys' fees that are otherwise reasonable," because "[s]uch an interpretation would be inconsistent with the plain statutory language of FASA which exempts small businesses from the specific cap imposed on large businesses—and we see no evidence that the

Congress intended such a result.” Id. Because this matter was fully addressed in *Public Communications Services, Inc.—Costs*, we see no reason to add the benchmark language to the final regulation.

Express options, flexible alternative procedures, accelerated schedules, summary decisions, and status and other conferences

GAO proposed to revise 4 CFR 21.10 to reflect the requirement to file documents through EPDS.

One commentator proposed that we revise the flexible schedule procedures in 4 CFR 21.10 to provide that GAO will seek the “concurrence” of the parties before using an alternate schedule. The commentator notes that the flexible schedule procedures, in particular the express option schedule, may change the parties’ filing dates and reduce the amount of time for filings.

GAO response: As a matter of practice, GAO considers the views of the parties when using the flexible schedule procedures in 4 CFR 21.10. However, GAO reserves the right to use these procedures even where the parties do not concur. GAO believes that the use of flexible schedule procedures aids our Office’s ability to meet our statutory obligations to provide an inexpensive and expeditious forum for the resolution of protests.

Nonstatutory Protests

Although not addressed in our proposed rule, GAO will revise 4 CFR 21.13(b) to clarify that certain provisions of 4 CFR do not apply to nonstatutory protests. The rule currently states that GAO will not issue recommendations for the payment of costs associated with nonstatutory protests, as otherwise

provided for in 4 CFR 21.8(d). The revised rule clarifies that GAO will also not issue recommendations for the payment of costs when an agency takes corrective action in response to a nonstatutory protest, as otherwise provided for in 4 CFR 21.8(e). The revised rule also clarifies that 4 CFR 21.6, which pertains to the withholding of award and the suspension of contract performance pursuant to 31 U.S.C. 3553(c) and (d), does not apply to nonstatutory protests.

List of Subjects in 4 CFR Part 21

Administrative practice and procedure, Appeals, Bid protest regulations, Government contracts.

For the reasons set out in the preamble, title 4, chapter I, subchapter B, part 21 of the Code of Federal Regulations is amended as follows:

PART 21—BID PROTEST REGULATIONS

1. The authority citation for part 21 continues to read as follows:

Authority: 31 U.S.C. 3551-3557.

2. In §21.0:

- a. Amend paragraph (a)(2) introductory text by adding the abbreviation “(OMB)” between the words Budget and Circular;
- b. Redesignate paragraphs (a)(2)(A) and (B) as paragraphs (a)(2)(i) and (ii), respectively;
- c. Amend paragraph (b)(2) by removing “(a)(2)(B)” and adding in its place (a)(2)(ii);
- d. Amend paragraph (c) by removing the word “his” and adding in its place the words “the Architect’s”;

e. Redesignate paragraphs (f) and (g) as paragraphs (g) and (h), respectively, and add a new paragraph (f);

f. Revise newly redesignated paragraph (g).

The addition and revision read as follows:

§21.0 Definitions.

* * * * *

(f) *Electronic Protest Docketing System (EPDS)* is GAO's web-based electronic docketing system. GAO's Web site [<https://epds.gao.gov/login>] includes instructions and guidance on the use of EPDS.

(g) A document is *filed* on a particular day when it is received in EPDS by 5:30 p.m., Eastern Time. Delivery of a protest or other document by means other than those set forth in the online EPDS instructions does not constitute a filing. Filing a document in EPDS constitutes notice to all parties of that filing.

* * * * *

3. Amend §21.1 by revising paragraphs (b) and (c)(1), the third sentence of paragraph (g), and by adding a new first sentence to paragraph (h) to read as follows:

§21.1 Filing a protest.

* * * * *

(b) Protests must be filed through the EPDS.

(c)* * *

(1) Include the name, street address, email address, and telephone and facsimile numbers of the protester,

* * * * *

(g) * * * This information must be identified wherever it appears, and within 1 day after the filing of its protest, the protester must file a final redacted copy of the protest which omits the information.

(h) Protests and other documents containing classified information shall not be filed through the EPDS. * * *

* * * * *

4. Amend §21.2 by adding a third sentence to paragraph (a)(1); by revising the second sentence of paragraph (a)(2) and the first sentence of paragraph (a)(3) to read as follows:

§21.2 Time for filing.

(a)(1) * * * If no closing time has been established, or if no further submissions are anticipated, any alleged solicitation improprieties must be protested within 10 days of when the alleged impropriety was known or should have been known.

(2) * * * In such cases, with respect to any protest basis which is known or should have been known either before or as a result of the debriefing, and which does not involve an alleged solicitation impropriety covered by paragraph (a)(1) of this section, the initial protest shall not be filed before the debriefing date offered to the protester, but shall be filed not later than 10 days after the date on which the debriefing is held.

(3) If a timely agency-level protest was previously filed, any subsequent protest to GAO must be filed within 10 days of actual or constructive knowledge of initial adverse agency action, provided the agency-level protest was filed in accordance with paragraphs (a)(1) and (2) of this section, unless the agency imposes a more stringent time for filing, in which case the agency's time for filing will control. * * *

* * * * *

5. Amend §21.3 by revising the section heading, paragraphs (a), (c), (d), (e), the first sentence of paragraph (f), paragraph (g), the first sentence of paragraph (h), and paragraph (i) to read as follows:

§21.3 Notice of protest, communications among parties, submission of agency report, and time for filing of comments on report.

(a) GAO shall notify the agency within 1 day after the filing of a protest, and, unless the protest is dismissed under this part, shall promptly provide a written confirmation to the agency and an acknowledgment to the protester. The agency shall immediately give notice of the protest to the awardee if award has been made or, if no award has been made, to all bidders or offerors who appear to have a substantial prospect of receiving an award. The agency shall provide copies of the protest submissions to those parties, except where disclosure of the information is prohibited by law, with instructions to communicate further directly with GAO. All parties shall provide copies of all communications with GAO to the agency and to other participating parties either through EPDS or by email.

GAO's Web site [<https://epds.gao.gov/login>] includes guidance regarding when to file through EPDS versus communicating by email or other means.

* * * * *

(c) The agency shall file a report on the protest within 30 days after receiving notice of the protest from GAO. The report need not contain documents which the agency has previously provided or otherwise made available to the parties in response to the protest. At least 5 days prior to the filing of the report, in cases in which the protester has filed a request for specific documents, the agency shall file a response to the request for documents. If the fifth day prior to the filing of the report falls on a weekend or Federal holiday, the response shall be filed by the last business day that precedes the weekend or holiday. The agency's response shall, at a minimum, identify whether the requested documents exist, which of the requested documents or portions thereof the agency intends to produce, which of the requested documents or portions thereof the agency intends to withhold, and the basis for not producing any of the requested documents or portions thereof. Any objection to the scope of the agency's proposed disclosure or nondisclosure of documents must be filed within 2 days of receipt of this response.

(d) The report shall include the contracting officer's statement of the relevant facts (including a best estimate of the contract value), a memorandum of law, and a list and a copy of all relevant documents, or portions of documents, not previously produced, including, as appropriate: the bid or proposal submitted by the protester; the bid or proposal of the firm which is being considered for

award, or whose bid or proposal is being protested; all evaluation documents; the solicitation, including the specifications; the abstract of bids or offers; and any other relevant documents. In appropriate cases, a party may file a request that another party produce relevant documents, or portions of documents, that are not in the agency's possession.

(e) Where a protester or intervenor does not have counsel admitted to a protective order and documents are withheld from the protester or intervenor on that basis, the agency shall file redacted documents that adequately inform the protester and/or intervenor of the basis of the agency's arguments in response to the protest. GAO's Web site [<https://epds.gao.gov/login>] provides guidance regarding filing documents where no protective order is issued or where a protester or intervenor does not have counsel admitted to a protective order.

(f) The agency may file a request for an extension of time for the submission of the response to be filed by the agency pursuant to §21.3(c) or for the submission of the agency report. * * *

(g) The protester may file a request for additional documents after receipt of the agency report when their existence or relevance first becomes evident. Except when authorized by GAO, any request for additional documents must be filed not later than 2 days after their existence or relevance is known or should have been known, whichever is earlier. The agency shall file the requested documents, or portions of documents, within 2 days or explain why it is not required to produce the documents.

(h) Upon a request filed by a party, GAO will decide whether the agency must file any withheld documents, or portions of documents, and whether this should be done under a protective order. * * *

(i)(1) Comments on the agency report shall be filed within 10 days after the agency has filed the report, except where GAO has granted an extension of time, or where GAO has established a shorter period for filing of comments. Extensions will be granted on a case-by-case basis.

(2) The protest shall be dismissed unless the protester files comments within the period of time established in §21.3(i)(1).

(3) GAO will dismiss any protest allegation or argument where the agency's report responds to the allegation or argument, but the protester's comments fail to address that response.

* * * * *

6. In §21.4:

- a. Amend paragraph (a) by removing the word "under" in the fourth sentence and adding in its place the word "to"; and adding a fifth sentence;
- b. Redesignate paragraphs (b), (c), and (d) as paragraphs (c), (d), and (e), respectively, and add a new paragraph (b);
- c. Revise the first sentence of newly redesignated paragraph (c); and revise the first and third sentences of newly designated paragraph (d).

The addition and revisions read as follows:

§21.4 Protective orders.

(a) * * * GAO generally does not issue a protective order where an intervenor retains counsel, but the protester does not.

(b) Any agency or party filing a document that the agency or party believes to contain protected material shall, if requested by another party, provide to the other parties (unless they are not admitted to the protective order) an initial proposed redacted version of the document within 2 days of the request. Where appropriate, the exhibits to the agency report or other documents may be proposed for redaction in their entirety. The party that authored the document shall file the final redacted version of the document that has been agreed to by all of the parties. Only the final agreed-to version of a redacted document must be filed. If the parties are unable to reach an agreement regarding redactions, the objecting party may submit the matter to GAO for resolution. Until GAO resolves the matter, the disputed information must be treated as protected.

(c) If no protective order has been issued, or a protester or intervenor does not have counsel admitted to a protective order, the agency may withhold from the parties those portions of its report that would ordinarily be subject to a protective order, provided that the requirements of §21.3(e) are met. * * *

(d) After a protective order has been issued, counsel or consultants retained by counsel appearing on behalf of a party may apply for admission under the order by filing an application. * * * Objections to an applicant's admission shall be filed within 2 days after the application is filed, although GAO may consider objections filed after that time.

* * * * *

7. In §21.5:

- a. Amend paragraph (a) by removing “601-613” and adding in its place “7101-7109”;
- b. Revise paragraph (b) subject heading, paragraph (b)(1), the first sentence of paragraph (b)(2), and paragraph (b)(3);
- c. Amend paragraph (d) by removing “423” and adding in its place “2101-2107”;
- d. Amend paragraph (e) by removing the words “in GAO” and adding in their place the words “with GAO”;
- e. Amend paragraph (f) by removing the word “which” in two places and adding in its place the word “that”;
- f. Amend paragraph (g) by removing “472” and adding in its place “102”;
- g. Revise paragraph (h); and
- h. Add paragraphs (l) and (m).

The revisions and additions read as follows:

§21.5 Protest issues not for consideration.

* * * * *

(b) *Small Business Administration (SBA) issues.* (1) *Small business size standards and North American Industry Classification System (NAICS) standards.* Challenges of established size standards or the size status of particular firms, and challenges of the selected NAICS code may be reviewed solely by the SBA. 15 U.S.C. 637(b)(6).

(2) *Small Business Certificate of Competency Program.* Referrals made to the SBA pursuant to sec. 8(b)(7) of the Small Business Act, or the issuance of,

or refusal to issue, a certificate of competency under that section will generally not be reviewed by GAO. * * *

(3) *Procurements under sec. 8(a) of the Small Business Act.* Under that section, since contracts are entered into with the SBA at the contracting officer's discretion and on such terms as are agreed upon by the procuring agency and the SBA, the decision to place or not to place a procurement under the 8(a) program is not subject to review absent a showing of possible bad faith on the part of government officials or that regulations may have been violated. 15 U.S.C. 637(a).

* * * * *

(h) *Subcontract protests.* GAO will not consider a protest of the award or proposed award of a subcontract except where the agency awarding the prime contract has filed a request that subcontract protests be decided pursuant to §21.13.

* * * * *

(l) *Protests of orders issued under task or delivery order contracts.* As established in 10 U.S.C. 2304c(e) and 41 U.S.C. 4106(f), GAO does not have jurisdiction to review protests in connection with the issuance or proposed issuance of a task or delivery order except for the circumstances set forth in those statutory provisions.

(m) *Protests of awards, or solicitations for awards, of agreements other than procurement contracts.* GAO generally does not review protests of awards, or solicitations for awards, of agreements other than procurement contracts, with

the exception of awards or agreements as described in §21.13; GAO does, however, review protests alleging that an agency is improperly using a non-procurement instrument to procure goods or services.

8. Revise §21.6 to read as follows:

§21.6 Withholding of award and suspension of contract performance.

When a protest is filed, the agency may be required to withhold award and to suspend contract performance. The requirements for the withholding of award and the suspension of contract performance are set forth in 31 U.S.C. 3553(c) and (d); GAO does not administer the requirements to withhold award or suspend contract performance. An agency shall file a notification in instances where it overrides a requirement to withhold award or suspend contract performance, and it shall file either a copy of any issued determination and finding, or a statement by the individual who approved the determination and finding that explains the statutory basis for the override.

9. Amend §21.7 by revising the first sentence of paragraph (a) and revising paragraph (e) to read as follows:

§21.7 Hearings.

(a) Upon a request filed by a party or on its own initiative, GAO may conduct a hearing in connection with a protest. * * *

* * * * *

(e) GAO does not provide for hearing transcripts. If the parties wish to have a hearing transcribed, they may do so at their own expense, so long as a copy of the transcript is provided to GAO at the parties' expense.

* * * * *

10. Amend §21.8 by revising paragraph (e), adding a paragraph (f) subject heading, revising paragraphs (f)(2) and (3), and adding paragraphs (f)(4) through (6) to read as follows:

§21.8 Remedies.

* * * * *

(e) *Recommendation for reimbursement of costs.* If the agency decides to take corrective action in response to a protest, GAO may recommend that the agency pay the protester the reasonable costs of filing and pursuing the protest, including attorneys' fees and consultant and expert witness fees. The protester shall file any request that GAO recommend that costs be paid not later than 15 days after the date on which the protester learned (or should have learned, if that is earlier) that GAO had closed the protest based on the agency's decision to take corrective action. The agency shall file a response within 15 days after the request is filed. The protester shall file comments on the agency response within 10 days of receipt of the response. GAO shall dismiss the request unless the protester files comments within the 10-day period, except where GAO has granted an extension or established a shorter period.

(f) *Recommendation on the amount of costs.*

* * * * *

(2) The agency shall issue a decision on the claim for costs as soon as practicable after the claim is filed.

(3) If the protester and the agency cannot reach agreement regarding the amount of costs within a reasonable time, the protester may file a request that GAO recommend the amount of costs to be paid, but such request shall be filed within 10 days of when the agency advises the protester that the agency will not participate in further discussions regarding the amount of costs.

(4) Within 15 days after receipt of the request that GAO recommend the amount of costs to be paid, the agency shall file a response. The protester shall file comments on the agency response within 10 days of receipt of the response. GAO shall dismiss the request unless the protester files comments within the 10-day period, except where GAO has granted an extension or established a shorter period.

(5) In accordance with 31 U.S.C. 3554(c), GAO may recommend the amount of costs the agency should pay. In such cases, GAO may also recommend that the agency pay the protester the costs of pursuing the claim for costs before GAO.

(6) Within 60 days after GAO recommends the amount of costs the agency should pay the protester, the agency shall file a notification of the action the agency took in response to the recommendation.

11. Amend §21.9 by revising paragraph (a) to read as follows:

§21.9 Time for decision by GAO.

(a) GAO shall issue a decision on a protest within 100 days after it is filed. GAO will attempt to resolve a request for recommendation for reimbursement of protest costs under §21.8(e), a request for recommendation on the amount of

protest costs under §21.8(f), or a request for reconsideration under §21.14 within 100 days after the request is filed.

* * * * *

12. Amend §21.10 by revising paragraph (a), the first sentence of paragraph (c), and paragraphs (d)(1) and (2) and (e) to read as follows:

§21.10 Express options, flexible alternative procedures, accelerated schedules, summary decisions, and status and other conferences.

(a) Upon a request filed by a party or on its own initiative, GAO may decide a protest using an express option.

* * * * *

(c) Requests for the express option shall be filed not later than 5 days after the protest or supplemental/amended protest is filed. * * *

(d) * * *

(1) The agency shall file a complete report within 20 days after it receives notice from GAO that the express option will be used.

(2) Comments on the agency report shall be filed within 5 days after receipt of the report.

* * * * *

(e) GAO, on its own initiative or upon a request filed by the parties, may use flexible alternative procedures to promptly and fairly resolve a protest, including alternative dispute resolution, establishing an accelerated schedule, and/or issuing a summary decision.

* * * * *

13. Amend §21.11 by revising paragraph (a) to read as follows:

§21.11 Effect of judicial proceedings.

(a) A protester must immediately advise GAO of any court proceeding which involves the subject matter of a pending protest and must file copies of all relevant court documents.

* * * * *

14. Amend §21.12 by revising paragraph (b) to read as follows:

§21.12 Distribution of decisions.

* * * * *

(b) Decisions will be distributed to the parties through the EPDS.

15. Amend §21.13 by revising paragraph (b) to read as follows:

§21.13 Nonstatutory protests.

* * * * *

(b) The provisions of this part shall apply to nonstatutory protests except for:

(1) Section 21.8(d) and (e) pertaining to recommendations for the payment of costs; and

(2) Section 21.6 pertaining to the withholding of award and the suspension of contract performance pursuant to 31 U.S.C. 3553(c) and (d).

16. Amend §21.14 by revising paragraph (b) and the second sentence of paragraph (c) to read as follows:

§21.14 Request for reconsideration.

* * * * *

(b) A request for reconsideration of a bid protest decision shall be filed not later than 10 days after the basis for reconsideration is known or should have been known, whichever is earlier.

(c) * * * To obtain reconsideration, the requesting party must show that GAO's prior decision contains errors of either fact or law, or must present information not previously considered that warrants reversal or modification of the decision; GAO will not consider a request for reconsideration based on repetition of arguments previously raised.

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